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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-757

FRIEDY B. HEISLER, M.D. and FRANCIS HEISLER,
Petitioners,

vs.

UNITED STATES OF AMERICA and JOSEPH M. CULLEN, District Director of Internal Revenue Service, San Francisco, California, and RANDOLPH THROWER, Commissioner of Internal Revenue Service, Washington, D.C.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The Petitioners, Friedy B. Heisler, M.D. and Francis Heisler, respectfully pray that a Writ of Certiorari issue the review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on June 21, 1972, from which judgment a Petition for a Rehearing was

timely filed. The rehearing was denied on July 17, 1972, at which time Petitioners' suggestion that a rehearing be granted, *en banc,* was also rejected.

An application for extension of time in which to file for a writ of certiorari was filed within the time provided by the Rules and the same was granted by Mr. Justice Douglas so that the present Petition may be filed on or before November 27, 1972, included.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported as 463 F.2d 375 and appears as Appendix 1 hereto. The United States District Court for the Northern District of California dismissed the Complaint without an Opinion.

JURISDICTION

This Petition for Certiorari is filed within the time allowed under the Rules including the extension of time granted by Mr. Justice Douglas. This Court's jurisdiction is invoked under 28 USCA, Section 1254(1).

QUESTIONS PRESENTED

1) Does Title 26 USCA Section 611, *et seq.* if construed that human depletion is excluded, constitutionally discriminate between taxpayers?

2) If Title 26 USCA Section 611, *et seq.* is construed that it does not cover human depletion among

the "other natural deposits", an unconstitutional class legislation in favor of material depletion is presented?

3) Does the Complaint permit proceedings as a class action?

4) Since the Complaint challenged constitutionality of a Congressional enactment, were Petitioners entitled to a hearing before a three-judge constitutional court?

STATUTORY PROVISIONS INVOLVED

United States Code Title 26, Section 611, "Allowance of Deduction for Depletion"; Section 612, "Basis for Cost Depletion"; Section 613, "Percentage Depletion". The foregoing Code Sections appear as Appendix 2.

STATEMENT OF THE CASE

The Complaint was filed on April 2, 1969, on behalf of the two named Petitioners.

> ". . . as well as on behalf of each and all of the persons similarly situated whether employed, or self employed, and support themselves and their families by their labor, be it manual or otherwise; such persons are so numerous as to make it impractical to bring them all before the Court; . . . the named Plaintiffs fairly ensure adequate representation of all . . ." (TR 2)*

The Complaint, after alleging jurisdictional reference and describing the nature of the Complaint as a

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*Pagination refers to the transcript of court filed by the Clerk of the United States Court of Appeals for the Ninth Circuit.

class action and describing the Petitioners as residing in Carmel, Monterey County, California, where they are both gainfully self-employed, further set forth that:

The Petitioner, Friedy B. Heisler, is a medical doctor, specializing in the field of psychiatry, with offices in Carmel, California. She graduated from high school and from two years college in Switzerland, her native country. Thereafter, she studied at the University of Illinois Medical School where she received her degrees, both BS and MD. Upon further improving her knowledge and experience, she became a Diplomate, and still later, a Fellow of the American Psychiatric Association. She was an Assistant Professor at the Illinois Neuropsychiatric Institute Medical School. She was on the psychiatric staff of several State and Federal institutions and was also consultant for public and private charity organizations. Presently, she is engaged in full private practice as a medical doctor and extension instructor at the University of California at Santa Cruz, and lecturer in her field. (TR 2 and 3)

The other named Petitioner, Francis Heisler, was described as a graduate from a school where he received the Baccalaureate Degree. He studied engineering at the Federal Polytechnical Institute in Zurich, Switzerland, and graduated with the diploma of an electrical engineer. He was an assistant to the professor in electrical engineering at his alma mater and subsequently became employed as an engineer in Germany, and later a research engineer in Chicago, Illi-

nois, in which occupation he continued until about 1930. While in Zurich, Switzerland, he studied law at the Department of Philosophy at the University of Zurich and he also continued law in Chicago, Illinois, and he received his Degree as a Juris Doctor. He was admitted to practice law in the States of Illinois and California, in the District of Columbia and before the Supreme Court of the United States, as well as before various District Courts and Courts of Appeals of the United States. At the present time, he is engaged in full time practice of law with offices in Carmel and Chicago and with associate law offices in Berkeley, California and Washington, D.C. (TR 3)

That at all times pertinent to the issues here, the Respondent Joseph M. Cullen was, and now is the District Director of Internal Revenue, San Francisco, California, and he is a resident of the Northern District of California, within the jurisdiction of this Court. Respondent Randolph Thrower is presently the Commissioner of the Internal Revenue Service, and as such, is the executive in charge of the policy of said service; Respondent United States is in need of no identification except that it is the entity which disposes of the taxes illegally and erroneously collected from the Petitioners and gets along without collecting depletion allowance granted to others than the Petitioners. (TR 3)

The Complaint was brought for the recovery of the sums of $1,239.37, $1,443.69 and $2,560.45, erroneously and illegally assessed by the Respondents against the named Petitioners as part of their income taxes for

the respective fiscal years of 1965, 1966 and 1967. (TR 4)

That on or about April 8, 1968, the Petitioners submitted to the Respondent District Director of Internal Revenue on form 843, a Claim for the Refund of taxes illegally, erroneously and excessively collected and on said form they made a claim for their respective refunds for the years above-mentioned on the ground that the Internal Revenue Code of 1954, Title 26, USCA, Section 611, *et seq.*, provides in computing taxable income for a reasonable allowance "for the depletion and for depreciation of improvements according to the peculiar conditions in each case." The Petitioners in their claim set forth that they did, in fact, improve their "natural deposits" by obtaining an education in schools and outside; Petitioner Friedy B. Heisler becoming a psychiatrist, teacher and a lecturer, and Petitioner Francis Heisler becoming an engineer, lawyer and lecturer; both of them having practiced their respective professions honorably for more than thirty years and they are still so practicing. They further claim that since they are within the reach of the Biblical age of three score years and ten it is to be expected that their "natural deposits" and the "improvements thereof", will be gradually depleted and in a foreseeable time, will undoubtedly wholly disappear. They requested a refund from the Respondent District Director of Internal Revenue in accordance with the Constitutional command of due process and within the equal protection of the law and further in accordance with the depletion allowance provided for other taxpayers under Sections 611,

612, and 613(b) of Title 26 USCA. They requested the maximum depletion allowance provided in said Title, i.e., twenty-seven and a half percent of the income tax jointly paid by them during the years 1965, 1966 and 1967. (TR 4)

Subsequently, under the date of February 18, 1969, the Respondent District Director of Internal Revenue informed Petitioners that their claim for the year 1966, in the amount of $2,560.45 was disallowed because "the examination did not disclose any basis for reducing this tax liability." The Respondent District Director also informed Petitioners that "the issue raised by your claim for refund has been considered during this examination and determined to be unallowable because the depletion allowance claimed did not meet any requirement of Section 611 of the 1954 Internal Revenue Code and T.B.M.39 Cumulative Bulletin No. 1, page 131," and the claim so presented by Petitioners for the year 1966 for refund in the amount representing twenty-seven and a half percent of the taxes jointly paid by them for such year was disallowed, and further that the Petitioners received no information from the Respondent District Director of Internal Revenue as to the allowance or disallowance of their claims filed for the years 1964 and 1965; however, the claims having been filed more than six months prior to the filing of this suit and no action was taken by the Respondent District Director of Internal Revenue concerning the same, it is assumed, and so to be considered, that the claims for the years 1964 and 1965 were disallowed, as was the claim for the year 1966. (TR 5)

The Complaint alleged that the Respondent District Director of Internal Revenue's interpretation of the Internal Revenue Code of 1954, Title 26 USCA, 611, 612 and 613(b) is wholly erroneous, illegal and unconstitutional. The interpretation is to the effect that depletion allowance is to be granted for such "natural resources" as oil and gas wells, minerals, timber, and many other natural deposits, but not be granted for such "natural resources" as a person's ability to earn a livelihood. Such interpretation by the Respondent District Director of Internal Revenue is immoral and, for that reason alone, and for other reasons, is unconstitutional, to boot, and is particularly contrary to the constitutional precept of due process of law as set forth in the Fifth Amendment to the Constitution of the United States and contrary to the precept of the equal protection of the law. The interpretation of the above statute by the Respondent District Director of Internal Revenue represents an insidious discrimination or classification which is patently arbitrary and utterly lacking in rational justification. The interpretation so made by the Respondent District Director of Internal Revenue is unjustifiable, unfair and violative of due process. (TR 5 and 6)

The Complaint also alleged that it is contrary to due process and contrary to the equal protection of the law when the Respondent District Director of Internal Revenue holds that the "natural resource" such as clay used or sold for the manufacture of drainage and roof tile and flower pots, is to be granted a 5% depletion allowance but none is to be granted to the Petitioners for the depletion of their "natural re-

sources" and the "improvement" thereof. It is clearly contrary to due process and the equal protection of the law when the Respondent District Director of Internal Revenue grants fifteen percent depletion allowance to such natural resources as china clay, sagger clay and clay used for the purposes dependent on its refractory properties, irrespective of whether or not such natural resources are inexhaustible or not, while holding that Petitioners are not entitled to depletion allowance of their natural resources, even if it is a foregone conclusion that their natural resources, in absence of a miracle, will be thoroughly exhausted. The interpretation and the holding referred to above by the Respondent Director of Internal Revenue that a twenty-seven and a half percent depletion allowance is to be granted on oil and gas wells, irrespective of whether they are to be exhausted sooner or later, when he holds that twenty-three percent depletion allowance is to be granted on sulphur and anorthosite clay, asbestos, or graphite and/or mica, irrespective of whether or not such resources will be exhausted while he holds that no depletion allowance is considered allowable for the soon totally exhausted natural resources of the Petitioners and the improvements of their resources. (TR 6 and 7)

The Complaint further alleged that no part of the named Petitioners' claim has been credited, remitted, refunded to them and therefore the full amount claimed as refund together with interest from the respective dates of the alleged overpayment is now due from the Respondents to the Petitioners.

The Complaint also alleged that because of the denial of the Respondent District Director of Internal Revenue of Petitioners' refund claims for the years 1964, 1965 and 1966 it is to be expected that similar claims for the years subsequent to 1966 during which Petitioners will be called upon to file their income tax returns, will be similarly denied unless this Honorable Court intervenes and grants its order upon the Respondents to refund to the named Petitioners twenty-seven and a half percent of the taxes paid by them for the years 1964, 1965 and 1966 in the amounts hereinabove indicated. (TR 7)

And further the prayer of the Complaint was set forth to the effect:

> "(1) That the plaintiffs are entitled to a refund and that the defendant District Director of Internal Revenue ought to pay to them the sums of $1,239.37, $1,443.69 and $2,560.45, with interest thereon, from April 15, 1965, April 15 1966 and April 15 1967 respectively at the rate of six percent, together with costs and disbursements of this action."

And as a further relief, the Petitioners asked that if the interpretation of the Respondent District Director of Internal Revenue denying Petitioners' claim for refund of twenty-seven and a half percent of their respective taxes be upheld by the U.S. District Court, then the Petitioners said that Title 26 USCA, Sections 611, 612 and 613(b), is unconstitutional because it represents insidious discrimination or classification which is patently arbitrary and utterly lacking in rational justification, and for the purpose of determin-

ing the constitutionality of said act referred to and because of the importance of the issues, the Petitioners hereby requested the convocation of a three-man constitutional Court to pass upon the issues therein raised as to the unconstitutionality of Title 26 USC 611, 612 and 613(b).

Petitioners, pursuant to 28 USC 2403, advised the United States that they may claim Title 26 USCA and Sections 611, 612 and 613(b) unconstitutional and did so by forwarding two copies of the Complaint, together with a Summons required by the Code. (TR 7 and 8)

The Respondents on August 22, 1969, filed their Notice of Motion to Dismiss on the grounds that—

"(1) The suit may not be maintained as a class action;

(2) Plaintiffs are not entitled to a depletion allowance for their ability to earn a livelihood;

(3) The depletion allowance does not deprive plaintiffs of due process of law and deny then (sic) equal protection of the law;

(4) Plaintiffs do not have standing to question the constitutionality of the depletion allowance;

(5) Declaratory and injunctive relief may not be granted with respect to plaintiffs' challenge of the constitutionality of the depletion allowance;

(6) A single judge has the power to dismiss this action notwithstanding the purported constitutional questions raised by the plaintiffs and their application for a three-judge Court. (TR 9 and 10)"

On April 21, 1970, the United States District Judge denied—without opinion—the application to convene a three-judge Court and further granted the Motion to Dismiss filed by the Respondents. (TR 75)

On the same date the Judgment was entered to the effect that the petitioners' complaint be dismissed with prejudice. (TR 73)

Petitioners filed their Notice of Appeal on June 18, 1970 (TR 76), Designation of Contents of Record on Appeal (TR 78 and 79), Statement of Points Relied Upon on Appeal by Plaintiffs-Appellants (TR 80), their Cost Bond on Appeal (TR 81).

REASONS FOR GRANTING THE WRIT

I

THE ISSUES HERE PRESENTED BY THE COMPLAINT AND ADVERSELY DISPOSED OF BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA AND BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IS ONE THAT WAS NEVER CONSIDERED BY THIS HONORABLE COURT AND BECAUSE OF THEIR EVER INCREASING IMPORTANCE OUGHT TO BE DECIDED BY THIS COURT.

Title 26 USCA Section 611, subsection (a) under the heading of General Rule provides, among others, that—

> "in the cause of mines, oil and gas wells, other natural deposits, and timber, there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion or for depreciation of improvements, according to the peculiar conditions in each case . . ."

The term "other natural deposits" distinguishes between mines, oil and gas wells on the one hand and timber on the other. Furthermore, Congress provided that a "reasonable allowance for depreciation of improvements be granted" and "according to the peculiar conditions in each case."

Petitioners in their complaint argued that the "other natural deposits" included their "natural resources", i.e., their ability to earn a livelihood. They also claimed that the statutory term as used in 26 USCA 611 "for depreciation of improvements" includes the improvement which they made upon their "natural deposits" by obtaining advanced education in schools and outside. They also set forth in their Complaint that since they are within the reach of the Biblical age of three score years and ten it is to be expected that their "natural deposits" and the "improvements thereof" will be gradually depleted and in a foreseeable time will undoubtedly wholly disappear. They further claimed in their Complaint with more truth than poetry that unlike the output of mines, oil and gas wells which may or may not be depleted, their "natural deposits" will, in absence of a miracle, undoubtedly disappear by total depletion.

Petitioners' request for refund filed with the District Director of Internal Revenue, pursuant to the provisions of Form 843 of the Internal Revenue Code of 1954, which claim for refund was denied, and the Complaint charged that such denial is contrary to due process and contrary to the equal protection of the law.

The Complaint then presented the constitutional issue of stating that if the interpretation of the District Director of Internal Revenue is upheld by the Court then Title 26 USCA Section 611, *et seq.*, is unconstitutional because it represents insidious discrimination and class legislation which is clearly arbitrary and has no rational justification.

Neither of the above issues, i.e., whether human depletion is included in Title 26 USCA Section 611, *et seq.*, nor the question of the constitutionality of the above Code if human depletion is not included was ever considered by this Honorable Court. The lack of consideration and decision by this Honorable Court justifies the granting of certiorari to review the judgment below.

The United States Court of Appeals agreed that the District Court had jurisdiction over the refund claim presented by Petitioners to the Internal Revenue Service, however, it held that—

> "The Appellants, however, do not fit within the statute. Their bodies and skills are not among the 'other natural deposits' for which the Internal Revenue Code allows a deduction for percentage depletion."

This *ipse dixit* holding does not square with the oft repeated holdings of this Court that Congress intended by enacting Title 26 USCA Sections 611, *et seq.* to enact a constitutionally permissible law and not one which constitutionally discriminates in favor of material holdings as against the ability to earn a living. *Yick Wo v. Hopkins,* 118 U.S. 356; *Skinner*

v. Oklahoma, 316 U.S. 527, 62 S.Ct. 448 (1942) and *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585 (1956).

From debate in Congress it appears that in fact it intended to tax incomes uniformly throughout the United States. Such intention is shown by 28 Stat. 509, 553. While it is true that this Court invalidated that statute in *Pollock v. Farmers Loan and Trust Company,* 157 U.S. 429 (1895) and 158 U.S. 601 (1895), the reasoning behind that holding appears to be quite tenuous, if not totally abandoned in the face of subsequent decisions of this Court.

Uniform taxation was incorporated in the Sixteenth Amendment to the Constitution which was ratified in 1913. Without reversing *Pollock,* supra, this Court sustained corporate income tax as an excise "measured by income . . . on the privilege of doing business in corporate form." *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911).

Petitioners claim that their ability to earn a living must be construed to be among "the other natural deposits" referred to in Title 26 USCA Sec. 611, which clearly is in line with the holdings of this Court in which it describes income as the "gain derived from capital, from labor, or from both combined", including therein the "profit gained through a sale or conversion of capital assets." See *Strattons Independent v. Hawbert,* 213 U.S. 399 (1913) and *Eisner v. Maycomber,* 252 U.S. 189 (1920).

The uniform taxation intended by Congress is without question and so is the inclusion of human effort in the depletion provision. This is shown by the In-

ternal Revenue Act in the 1920's providing for a 25% deduction of the earned income from the total taxable income. While it is true that this recognition of human ability to earn a living as a "natural resource" for taxation purposes was reduced and later wholly disappeared was the result not of Congressional intent but of the new dialectics which made material values supreme at the cost of all others. However, as Mr. Justice Douglas said in *Harper v. Virginia,* 383 U.S. 633, 86 S.Ct. 1079:

> "The Equal Protection Clause is not shackled by the political theory of a particular era. In determining what lines of unconstitutionality are discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."

The Internal Revenue Service in rejecting Petitioners' claim for refund based on the depletion allowance allocated to their ability to make a living is not in line with the dissent of Mr. Justice Blackman in *Sierra Club v. Morton,* 92 S.Ct. 1361 (April 19, 1972), who said:

> "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the constitutional concepts do not quite fit and do not prove to be entirely adequate for new issues."

Petitioners submit that the decision below ought to be reviewed and that therefore the Petition for a Writ of Certiorari ought to be granted.

II

FLAST v. COHEN, 392 U.S. 83 (1968) WAS MISREAD BY THE UNITED STATES COURT OF APPEALS WHEN IT HELD THAT ON THE ABOVE AUTHORITY APPELLANTS LACK THE REQUISITE STANDING TO RAISE THE ISSUE OF THE CONSTITUTIONALITY OF TITLE 26 USCA SECTION 611, ET SEQ.

The Court below held that

> "on the claim that 26 USCA Sections 611, *et seq.* are unconstitutional, the Heislers lacked the requisite standing to raise this issue." *Flast v. Cohen,* supra.

The above further *ipse dixit* does not express the thoughts as were expressed by this Court speaking through Chief Justice Warren. *Flast,* supra, as Petitioners submit, stands for a holding that they have standing even by the interpretation of the law by the sole dissenter, Mr. Justice Harlan. As we read Justice Harlan's dissent, he would have classified Petitioners as "non-Hohfeldian" plaintiffs who have standing to complain *not qua* taxpayers, but as "private attorneys general." Reading the majority opinion in *Flast,* supra, it is clear that the Court set for itself the task

> "to decide whether the Frothingham barrier should be lowered when a taxpayer attacks a federal statute . . ."

In the *Flast,* supra, case Chief Justice Warren followed the commentators when he analyzed the *Frothingham* holding and stated that

> "the concrete reasons given for denying standing to a federal taxpayer suggest that the court's

> holding rests on something less than a constitutional foundation . . . the petitioner in Frothingham was denied standing not because she was a taxpayer but because her tax bill was not large enough."

and then he added

> "to the extent that Frothingham has been rejected as resting on policy considerations, it has been classified as depending on assumptions not consistent with modern conditions."

Even when applying the yardstick used in *Frothingham,* Petitioners submit that their interest in the issues expressed monetarily is not a minescule one since their claim for refund was in the respective amounts of $1,239.37, $1,443.69 and $2,560.45 for the years of 1965, 1966 and 1967, and as the Complaint alleges that they expected that their claim for refund for the years following 1967 would be not less than $2,500.00. However, it is submitted that this yardstick was substantially abandoned in the *Flast,* supra, holding where it was held that:

> "Standing has been called one of 'the most amorphous (concepts) in the entire domain of public law,' some of the complexities peculiar to standing problems result because standing 'serves, on occasion, as a shorthand expression for all the various elements of justiciability.' In addition, there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations."

and further that

> "Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions'. Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 8 L.Ed. 2d 663 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."

Petitioners submit that here, as in the *Flast* case, supra,

> "their complaint contains sufficient allegations under the criteria we (The Supreme Court) have outlined (in the Flast case) to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits."

The Court below erred when it held that Petitioners had no standing and to review that holding a Petition for Certiorari ought to be granted.

III

THE PETITIONERS WERE ENTITLED TO HAVE THEIR CASE HEARD BY A THREE-JUDGE CONSTITUTIONAL COURT BOTH IN ACCORDANCE WITH RULE 35 OF THE FEDERAL RULES OF PROCEDURE AND ALSO ON THE BASIS OF THE VARIOUS DECISIONS OF THE COURTS.

Petitioners' complaint carried two thrusts. The first argued that under the assumption of the constitutionality of a congressional enactment they ought to be not excluded from the benefit of the law as the Internal Revenue Service by refusing to grant their refund did do. Secondly they claimed that if the Court should hold the interpretation of the Internal Revenue Service proper, then it must hold that Title 26 USCA Section 611, *et seq.*, is unconstitutional as class legislation. Petitioners submit that this two-pronged claim should have prompted the District Court to convene a three-man court and that such claim was upheld by the Supreme Court of the United States in *Flast*, supra, when it was said by the majority of the Court, with one member dissenting, that

> "the government argues that a three-judge court should not have been convened because appellants question not the constitutionality of the Elementary and Secondary Education Act of 1965, but its administration. The decision in Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), is dispositive on this issue. It is true that appellants' complaint states a non-constitutional ground for relief, namely, that appellees' actions in approving the expenditure of federal funds for allegedly unconstitutional programs are in excess of their authority under the Act. How-

> ever, the complaint also requests an alternative and constitutional ground for relief, namely, a declaration that, if appellees' actions 'are within the authority and intent of the Act, the Act is to that extent unconstitutional and void.' The Court noted in Zemel v. Rusk, supra, '[W]e have often held that a litigant need not abandon his nonconstitutional arguments in order to obtain a three-judge court.' (citing cases) The complaint in this case falls within that rule."

Petitioners submit that their Complaint falls within the rule set forth in *Zemel* and quoted with approval in *Flast,* supra, and that, in consequence, they were entitled to a hearing before a three-judge court and the holding of the United States Court of Appeals to the contrary requires the granting of a writ of certiorari.

IV

THE ABSENCE OF SHOWING THAT THERE ARE OTHERS WHO ARE SIMILARLY SITUATED TO THE PETITIONERS DOES NOT JUSTIFY THE DISMISSAL OF A COMPLAINT FILED AS A CLASS SUIT.

The holding of the United States Court of Appeals states:

> "The Appellants styled their action a class action. However, there was no showing that any other members of the purported class filed the requisite demands for refund. 26 U.S.C. §7422."

Petitioners admit that in their Complaint they made no showing that other members of the class did file the requisite demands for refund. However, they maintain that such a showing is not required. They believe that they complied with the requirement of

the law when in their Complaint they set forth that the issues are presented on their own behalf:

> ". . . as well as on behalf of each and all of the persons similarly situated whether employed or self-employed and support themselves and their families by their labor, be it manual or otherwise, such persons are so numerous as to make it impractical to bring them all before the court. . . . the named plaintiffs fairly insure adequate representation of all. . . ."

Petitioners believe that that was all that was required of them to do notwithstanding the argument of the respondents. There was no showing that there are not others who filed their refund claim with the Internal Revenue Service under 26 U.S.C. §7422. Therefore, they submitted that the Court erred to dismiss the class suit since the usual and customary procedure would have been for the District Court to set a reasonable date within which to amend the Complaint and bring in the additional name of those plaintiffs who qualified within the class. The dismissal of the class claim out of hand was error.

As it was said that Rule 23 pertaining to class actions is a remedial rule that should be liberally construed and applied. This treatment was accorded original Rule 23 (See *Weaks v. Bareco Oil Co.* (CCA 7 1941) 125 F.2d 84) and the comparable construction and application of the revised rule was found to be proper among others in *Eisen v. Carlisle and Jacquelin* (CA 2d 1968) 391 F.2d 555 where it was said:

> "But to dismiss a class suit in its insipiency before claimants have been given an effective op-

portunity to join would be a disservice to the class action as envisioned in the new rule. Indeed we hold that the new rule should be given a liberal rather than a restrictive interpretation, Escott v. Barchris Construction Corporation 340 F.2d 731, 733 (2nd Circuit 1965) Cert. denied 382 U.S. 816, 86 S.Ct. 37, 15 L.Ed.2d 63 (1966) and that dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself." See also *Richardson v. United States,* 3rd Circuit 465 F.2d 844, decided July 20, 1972.

This holding supports Petitioners' contention as to the propriety of the class suit.

CONCLUSION

For the reasons set forth a Writ of Certiorari should issue to review the judgment of the Opinion of the United States Court of Appeals for the Ninth Circuit.

Executed in Carmel, California, this 14th day of November, 1972.

Respectfully submitted,
FRANCIS HEISLER,
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Attorneys for Petitioners.

(Appendices Follow)

Appendix I

No. 26,121

United States Court of Appeals
for the Ninth Circuit

Friedy B. Heisler, M.D., and
Francis Heisler,
Plaintiffs and Appellants,
vs.
United States of America and Joseph
M. Cullen, District Director of Inter-
nal Revenue Service, etc., et al.,
Defendants and Appellees.

[June 21, 1972]

On Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, BROWNING and KILKENNY,
Circuit Judges.

Per curiam:

In this tax case the district court had jurisdiction over the refund claim under 28 U.S.C. § 1346(a)(1). The appellants, however, do not fit within the statute. Their bodies and skills are not among the "other nat-

ural deposits" for which the Internal Revenue Code allows a deduction for percentage depletion.

On the claim that 26 U.S.C. sections 611 et seq. are unconstitutional, the Heislers lack the requisite standing to raise this issue. Flast v. Cohen, 392 U.S. 83 (1968).

The appellants style their lawsuit a class action. However, there is no showing that any other members of the purported class filed the requisite demands for refund. 26 U.S.C. § 7422.

The judgment is affirmed.

Appendix 2

STATUTORY PROVISIONS
(Title 26 USCA)

§611. Allowance of deduction for depletion

(a) General rule.—In the case of mines, oil and gas wells, other natural deposits, and timber, there shall be allowed as a deduction

in computing taxable income a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary or his delegate. For purposes of this part, the term "mines" includes deposits of waste or residue, the extraction of ores or minerals from which is treated as mining under section 613(c). In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this section for subsequent taxable years shall be based on such revised estimate.

(b) Special rules.—

(1) Leases.—In the case of a lease, the deduction under this section shall be equitably apportioned between the lessor and lessee.

(2) Life tenant and remainderman.—In the case of property held by one person for life with remainder to another person, the deduction under this section shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant.

(3) Property held in trust.—In the case of property held in trust, the deduction under this section shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

(4) Property held by estate.—In the case of an estate, the deduction under this section shall be apportioned between the estate and the heirs, legatees, and devisees on the basis of the income of the estate allocable to each.

(c) Cross reference.—

For other rules applicable to depreciation of improvements, see section 167.

Aug. 16, 1954, c. 736, 68A Stat. 207; Sept. 2, 1958, Pub.L. 85-866, Title I, § 35, 72 Stat. 1632.

§612. Basis for cost depletion

Except as otherwise provided in this subchapter, the basis on which depletion is to allowed in respect of any property shall be the adjusted basis provided

in section 1011 for the purpose of determining the gain upon the sale or other disposition of such property. Aug. 16, 1954, c. 736, 68A Stat. 208.

§613. *Percentage depletion*

(a) General rule.—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion). For purposes of the preceding sentence, the allowable deductions taken into account with respect to expenses of mining in computing the taxable income from the property shall be decreased by an amount equal to so much of any gain which (1) is treated under section 1245 (relating to gain from disposition of certain depreciable property) as gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231, and (2) is properly allocable to the property. In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

(b) Percentage depletion rates.—The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

(1) 27½ percent—oil and gas wells.

(2) 23 percent—

(A) sulfur and uranium; and

(B) if from deposits in the United States —anorthosite clay, laterite, and nephelite syenite (to the extent that alumina and aluminum compounds are extracted therefrom), asbestos, bauxite, celestite, chromite, corundum, fluorspar, graphite, ilmenite, kyanite, mica, olivine, quartz chystals (radio grade), rutile, block steatite talc, and zircon, and ores of the following metals: antimony, beryllium, bismuth, cadmium, cobalt, columbium, lead, lithium, manganese, mercury, nickel, platinum and platinum group metals, tantalum, thorium, tin, titanium, tungsten, vanadium, and zinc.

(3) 15 percent—

(A) metal mines (if paragraph (2) (B) does not apply), rock asphalt, and vermiculite; and

(B) if neither paragraph (2) (B), (5) or (6) (B) applies, ball clay, bentonite, china clay, sagger clay, and clay used or sold for use for purposes dependent on its refractory properties.

(4) 10 percent—asbestos (if paragraph (2) (B) does not apply), brucite, coal, lignite, perlite, sodium chloride, and wollastonite.

(5) 7½ percent—clay and shale used or sold for use in the manufacture of sewer pipe or brick, and clay, shale, and slate used or sold for use as sintered or burned lightweight aggregates.

(6) 5 percent—

(A) gravel, peat, pumice, sand, scoria, shale (except shale described in paragraph (5)), and stone, (except stone described in paragraph (7));

(B) clay used, or sold for use, in the manufacture of drainage and roofing tile, flower pots, and kindred products; and

(C) if from brine wells—bromine, calcium chloride, and magnesium chloride.

(7) 15 percent—all other minerals (including, but not limited to, aplite, barite, borax, calcium carbonates, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, mollusk shells (including clam shells and oyster shells), phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (2)(B) does not apply) bauxite, flake graphite, fluorspar, lepidolite, mica, spodumene, and talc, including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (3), the percentage shall be 5 percent for any

such other mineral (other than slate to which paragraph (5) applies) when used, or sold for use, by the mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term "all other minerals" does not include—

(A) soil, sod, dirt, turf, water, or mosses; or

(B) minerals from sea water, the air, or similar inexhaustible sources.

(c) Definition of gross income from property.—For purposes of this section—

(1) Gross income from the property.—The term "gross income from the property" means, in the case of a property other than an oil or gas well, the gross income from mining.

(2) Mining.—The term "mining" includes not merely the extraction of the ores or minerals from the ground but also the treatment processes considered as mining described in paragraph (4) (and the treatment processes necessary or incidental thereto), and so much of the transport of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which such treatment processes are applied thereto as is not in excess of 50 miles unles the Secretary or his delegate finds that the physical and other requirements

are such that the ore or mineral must be transported a greater distance to such plants or mills.

(3) Extraction of the ores or minerals from the ground.—The term "extraction of the ores or minerals from the ground" includes the extraction by mine owners or operators of ores or minerals from the waste or residue of prior mining. The preceding sentence shall not apply to any such extraction of the mineral or ore by a purchaser of such waste or residue or of the rights to extract ores or minerals therefrom.

(4) Treatment processes considered as mining.—The following treatment processes where applied by the mine owner or operator shall be considered as mining to the extent they are applied to the ore or mineral in respect of which he is entitled to a deduction for depletion under section 611:

(A) in the case of coal—cleaning, breaking, sizing, dust allaying, treating to prevent freezing, and loading for shipment;

(B) in the case of sulfur recovered by the Frasch process—cleaning, pumping to vats, cooling, breaking, and loading for shipment;

(C) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and ores or minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, sintering, and substantially

equivalent processes to bring to shipping grade and form, and loading for shipment;

(D) in the case of lead, zinc, copper, gold, silver, uranium, or fluorspar ores, potash, and ores or minerals which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore or the mineral or minerals from other material from the mine or other natural deposit;

(E) the pulverization of talc, the burning of magnesite, the sintering and nodulizing of phosphate rock, and the furnacing of quicksilver ores;

(F) in the case of calcium carbonates and other minerals when used in making cement —all processes (other than pre-heating of the kiln feed) applied prior to the introduction of the kiln feed into the kiln, but not including any subsequent process;

(G) in the case of clay to which paragraph (5) or (6)(B) of subsection (b) applies—

crushing, grinding, and separating the mineral from waste, but not including any subsequent process; and

(H) any other treatment process provided for by regulations prescribed by the Secretary or his delegate which, with respect to the particular ore or mineral, is not inconsistent with the preceding provisions of this paragraph.

(5) Treatment processes not considered as mining.—Unless such processes are otherwise provided for in paragraph (4) (or are necessary or incidental to processes so provided for), the following treatment processes shall not be considered as "mining": electrolytic deposition, roasting, calcining, thermal or electric smelting, refining, polishing, fine pulverization, blending with other materials, treatment effecting a chemical change, thermal action, and molding or shaping.

(d) Application of percentage depletion rates to certain taxable years ending in 1954.—

(1) General rule.—At the election of the taxpayer of any property (within the meaning of the Internal Revenue Code of 1939), the percentage specified in subsection (b) in the case of any mine, well, or other natural deposit listed in such subsection shall apply to a taxable year ending after December 31, 1953, to which the Internal Revenue Code of 1939 applies.

(2) Method of computation.—The allowance for depletion, in respect of any property for which an election is made under paragraph (1) for any taxable year, shall be an amount equal to the sum of—

(A) that portion of a tentative allowance, computed under the Internal Revenue Code of 1939 without regard to paragraph (1) of this subsection, which the number of days in such taxable year before January 1, 1954, bears to the total number of days in such taxable year; plus

(B) that portion of a tentative allowance, computed under the Internal Revenue Code of 1939 (as modified solely by the application of paragraph (1) of this subsection), which the number of days in such taxable year after December 31, 1953, bears to the total number of days in such taxable year.

Aug. 16, 1954, c. 736, 68A Stat. 208; Sept. 2, 1958, Pub. L. 85-866, Title I, § 36(a), 72 Stat. 1633; June 30, 1960, Pub.L. 86-564, Title III, § 302(a), (b), 74 Stat. 291; Oct. 16, 1962, Pub.L. 87-834, § 13(e), 76 Stat. 1034; Sept. 2, 1964, Pub.L. 88-571; § 6(a), 78 Stat. 860; Nov. 13, 1966, Pub.L. 89-809, Title II, §§ 207(a), 208(a), 209(a), (b), 0 Stat. 1579, 1580.
208(a), 209(a), (b), 80 Stat. 1579, 1580.